

## MINUTE ENTRY

### **[Montoya Minute Entry]**

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court and the memoranda submitted by counsel.

Appellant alleges the trial court erred in denying his Motions to Dismiss for failing to file charges within the applicable statute of limitations and for violating his right to a speedy trial. Appellant states that the appropriate statute of limitations began to run at the time the homeowner was told Appellant was not a licensed contractor on December 14, 1995 and, therefore, the complaint filed by the State on January 15, 1997 was not timely. Appellant further claims that his right to a speedy trial was violated by the State's failure to exercise due diligence in serving him with a summons in this matter. The summons mailed to Appellant was returned to the court as undeliverable and Appellant was not aware of the warrant against him until August 2000.

Appellee maintains that the statute of limitations began to run when the Registrar of Contractors first became aware of Appellant's violations of the law on May 31, 1996. As the complaint was filed less than one year from that date, Appellee claims that there was no violation of the statute of limitations. Appellee states that Appellant's right to a speedy trial was not violated because Arizona Rule of Criminal Procedure 8 takes effect only after either a summons has been served or an arrest has been made. Therefore, Rule 8 began to run when Appellant was arrested and the outstanding warrant against him quashed on August 1, 2000.

The standard of review for a trial court's decision whether to grant a motion to dismiss is whether there was an abuse of discretion.<sup>1</sup> This Court will not reverse the trial court's decision to deny the Motions to Dismiss unless it appears that the trial judge abused his discretion and acted arbitrarily.<sup>2</sup> Here, there is no evidence that the trial judge acted in an arbitrary and capricious manner.

Regarding the issue of statute of limitations, both parties agree that the complaint was filed on January 15, 1997. Appellant claims that the statute of limitations began to run when Appellant allegedly told the homeowner he was unlicensed and entered into the contract with the homeowner on December 14, 1995.<sup>3</sup> Appellee believes the statute of limitations began to run when the

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<sup>1</sup> *State v. Pecard*, 196 Ariz. 371, 376, 998 P.2d 453, 458 (1999); *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988).

<sup>2</sup> *Id.*

<sup>3</sup> Appellant's Memorandum dated July 16, 2001, at page 5.

homeowner informed the Registrar of Contractors of the violation on May 31, 1996.<sup>4</sup> The trial court clearly stated it believed the date stamp on the Registrar of Contractors report indicated that agency received the report on that date.<sup>5</sup> Based upon the evidence, this was a reasonable belief. Appellant stated at the hearing that had not seen the date stamp before<sup>6</sup> and it is common sense that the Registrar of Contractors would date-stamp their reports. Appellant has provided no evidence to support his claim that the statute of limitations begins to toll when the homeowner, who is not a party to this matter, knew of the violation as opposed to when the state first had knowledge of the violation.

Appellant's claim that he was denied a speedy trial under Rule 8 of the Arizona Rules of Criminal Procedure is also misguided. Appellant's claim that the State failed to exercise due diligence in serving him with the summons does appear to have some merit. Based upon the record, after the return of the summons mailed to Appellant, the State made no further efforts at service and simply obtained a bench warrant.<sup>7</sup> Such limited efforts do not fulfill the due diligence requirement and are not justified by excuses of lack of resources and manpower.<sup>8</sup>

The Arizona Court of Appeals has more recently held, however, that such due diligence failures do not constitute a violation of Rule 8.<sup>9</sup> Instead, Rule 8 is triggered on the date the defendant is arraigned and the bench warrant quashed.<sup>10</sup> Appellant was arraigned on August 1, 2000 and was convicted on February 26, 2001.<sup>11</sup> This time period is less than 150 business days. Thus, there was no violation of Rule 8.

Appellant also cannot show sufficient prejudice to his case to sustain his claim of a violation of the speedy trial requirement of the 6<sup>th</sup> Amendment to the United States Constitution. As both parties point out, the test for such a violation is found in *Barker v. Wingo*<sup>12</sup> and consists of four parts: the length of the delay, the cause of the delay, whether the defendant asserted his right to a speedy trial, and whether the delay is prejudicial.<sup>13</sup> All four of these factors must be weighed together.<sup>14</sup> In *Doggett v. United States*, the court noted that a delay of at least one year triggered the *Barker* inquiry.<sup>15</sup>

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<sup>4</sup> Appellee's Memorandum dated August 20, 2001, at page 4.

<sup>5</sup> See audiotape of trial court motion hearing.

<sup>6</sup> *Id.*

<sup>7</sup> See audiotape of trial court motion hearing.

<sup>8</sup> *State v. Snow*, 157 Ariz. 597, 599, 760 P.2d 597, 599 (Ariz. Ct. App. 1988).

<sup>9</sup> *Hennessey v. Arizona*, 190 Ariz. 298, 300, 947 P.2d 872, 875 (Ariz. Ct. App. 1997).

<sup>10</sup> *Id.*

<sup>11</sup> Appellant's Memorandum dated August 20, 2001, at page 7.

<sup>12</sup> 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

<sup>13</sup> *Id.* at 530.

<sup>14</sup> *Id.*

<sup>15</sup> 505 U.S. 647, 652, 112 S.Ct. 2686, 2691, 120 L.Ed.2d 520, 528 (1992). In that case, eight-and-one-half years elapsed between the defendant's indictment and his arrest.

Here, while Appellee was partially responsible for the delay, that alone is not sufficient to find that Appellant suffered a violation of his 6<sup>th</sup> Amendment rights. While a delay of approximately three-and-one-half years is significant, moreover, it is not so substantial to create a presumption that Appellant was deprived of his right to a speedy trial unless this delay was prejudicial. Appellant cites *Doggett* for the proposition that prejudice is presumptive if there is a delay of at least one year, but, as stated above, that is not what *Doggett* actually says. Appellant provides no other evidence of prejudice to him as a result of the three-and-one-half year delay between filing of the complaint and sentencing and no such prejudice is evident from the records.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings.